Docket Nos.: 05-0259, 05-0260, 05-0261, 05-0262, 05-0263, 05-0264, 05-0265, 05-0270, 05-0275, 05-0277, and 05-0298 (Cons.)
Bench Date: 07-13-05
Deadline: 10-12-05

M E M O R A N D U M

TO: The Commission

FROM: John D. Albers, Administrative Law Judge

DATE: July 1, 2005

SUBJECT: Cambridge Telephone Company
C-R Telephone Company
El Paso Telephone Company
Geneseo Telephone Company
Henry County Telephone Company
Mid Century Telephone Cooperative, Inc.
Reynolds Telephone Company
Metamora Telephone Company
Harrisonville Telephone Company
Marseilles Telephone Company
Viola Home Telephone Company

Petitions for Declaratory Relief and/or Suspension or Modification Relating to Certain Duties under Sections 251(b) and (c) of the Federal Telecommunications Act, pursuant to Section 251(f)(2) of that Act; and for any other necessary or appropriate relief.

RECOMMENDATION: Grant the Emergency Motion for Leave to Cite Additional Authority.
Deny Sprint's Request for Oral Argument.
Enter the attached Post-Exceptions Proposed Order.

Currently pending before the Commission is an Order concerning the declaratory ruling requests of the above named small, rural incumbent local exchange carriers ("ILECs"). As discussed in earlier memoranda to the Commission, the ILECs in question maintain that they have no obligation to negotiate interconnection with Sprint because Sprint, under the circumstances, is not a "telecommunications carrier" as that term is defined in the Federal Telecommunications Act of 1996 ("Federal Act"). The attached Post-Exceptions Proposed Order ("PEPO") concurs with the ILECs' assessment and finds that Sprint is not a "telecommunications carrier" that the ILECs

must negotiate with under subsections (a) and (b) of Section 251 of the Federal Act. The attached PEPO is the same as the last version submitted to the Commission.

On June 27, 2005, two days before the Commission was to again consider the PEPO, the United States Supreme Court issued its decision in *National Cable & Telecommunications Association v. Brand X Internet Services*, Docket 04-0277 ("*Brand X*"). On the morning of June 28, 2005, Metamora Telephone Company, Harrisonville Telephone Company, Marseilles Telephone Company, and Viola Home Telephone Company (collectively "Movants") filed an Emergency Motion for Leave to Cite Additional Authority ("Motion"). Movants contend that *Brand X* supports their position and the conclusion in the PEPO and request that the Commission consider it in their deliberations. An expedited schedule was set for responses and replies. Sprint and Staff each filed a response to the Motion. Staff filed a reply to Sprint's response. At the Commission's June 29, 2005 Bench Session, the Commission requested that I more thoroughly review the recent pleadings and make a recommendation on a course of action for the Commission's July 13, 2005 Bench Session.

In the order under review in *Brand X*, the Federal Communications Commission ("FCC") concluded that cable companies that sell broadband Internet service do not provide "telecommunications service" as the Federal Act defines that term, and hence are exempt from mandatory common-carrier regulation under Title II of the Federal Act. The Supreme Court concluded that the FCC's construction of the Federal Act is lawful. In applying *Brand X* to the present situation, Movants assert that broadband Internet service is the same as cable modem service. Movants contend further that the underlying service that Sprint seeks to support with its proposed interconnection agreements is a cable modem service. Because, according to Movants, the FCC has determined that cable modem service is solely an "information service," and not a "telecommunications service," and because Movants read *Brand X* to affirm this FCC conclusion, Movants maintain that the ILECs have no obligation under the Federal Act to negotiate with Sprint. In light of *Brand X*, Movants urge the Commission to enter the PEPO as is or with additional citation to *Brand X*.

While Sprint has no objection to the Commission's consideration of *Brand X*, it strongly objects to the interpretation and application of the Supreme Court's opinion made by Movants. Sprint agrees that the Supreme Court upheld the FCC's determination that broadband Internet service provided by cable companies, also known as cable modem service, is solely an "information service" and not a "telecommunications service." Sprint insists, however, that Movants are incorrect in characterizing the service that Sprint seeks to interconnect as broadband Internet service. To be clear, Sprint states that it is not proposing to offer Internet service and requests that additional oral argument be heard so that it may elaborate on what it intends to provide. Despite Movants' assertions to the contrary, Sprint maintains that its offerings are not the same as those at issue in *Brand X*. Accordingly, Sprint suggests that *Brand X* is not as determinative as Movants would like.

Similarly, Staff also argues that Movants have misapplied *Brand X*. Staff asserts that the Supreme Court merely upheld, as a permissible construction of the Federal Act, the FCC determination that cable modem service is an "information service" within the meaning of Section 153(20). Staff insists that the FCC has not attempted to classify Voice over Internet Protocol ("VoIP") service, which has been identified as what Sprint intends to provide. Staff notes that the FCC recently declined to decide whether VoIP service was a "telecommunications service" or an "information service."[1] As recently as May of 2005, Staff adds, the FCC stated, "[b]ecause we have not decided whether interconnected VoIP services are telecommunications services or information services, we analyze the issues addressed in this Order primarily under our Title 1 ancillary jurisdiction to encompass both types of service."[2] Moreover, Staff claims that the FCC issued a decision suggesting that at least one form of Internet protocol telephony is a "telecommunications service," contrary to Movants' understanding of the FCC's position.[3] In its reply to Sprint's response to the Motion, Staff asserts that Sprint's arguments show the infirmities of its position in the proceeding overall. Staff also recommends that Sprint's request for oral argument be denied since Staff finds *Brand X* inapposite and because there has been no change in circumstances since oral argument was last heard on June 9.

Upon further reflection, I believe my initial assessment of the Motion was correct. *Brand X* should not be read as broadly as Movants suggest in light of the FCC orders identified by Staff. Because there is no harm in considering *Brand X* for what its worth, I recommend that the Commission grant the Motion but not accept the interpretation of *Brand X* contained in the Motion. While I could issue a ruling granting the Motion myself, since there is currently pending before the Commission an Order in this matter, I leave it to the Commission to decide. With regard to Sprint's request for oral argument, I see no reason to hear additional oral argument at this time. Finally, I urge the Commission enter the attached PEPO at its July 13, 2005 Bench Session. The PEPO properly focuses on the entity serving the end-users as required by *Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921 (1999), and is consistent with the only other state public utility commission (Iowa Utilities Board, Docket No. ARB-05-2) known to have considered *Virgin Islands Telephone* in addressing a similar set of facts.

In preparing for the July 13 Bench Session, I also caution the Commission to be wary of Sprint's description of what it intends to provide. In the earliest steps of this proceeding, it was very clear that MCC Telephony of Illinois, Inc. ("MCC") is the entity that would be serving end-users. As it became apparent that the entity actually serving end-users would be an issue, Sprint's description of its relationship with MCC evolved.

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[1] *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, FCC No. 04-267, WC Docket No. 03-211 (released November 12, 2004), Paragraphs 20-22.

[2] *In the Matters of IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, FCC No. 05-116, WC Docket Nos. 04-36 and 05-196 (released June 3, 2005), Paragraph 22.

[3] *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, FCC No. 04-97, WC Docket No. 02-361 (released April 21, 2004), Paragraph 18.

At this point, one could read Sprint's response to the Motion and surmise that Sprint has merely hired MCC as a marketer. Sprint appears to be changing the way its describes its relationship with MCC in order to support its claim that it (Sprint) is the entity serving end-users. The Commission should be careful to not forget that MCC is the entity actually serving end-users on a non-discriminatory basis. (If in fact Sprint and MCC's business agreement is still in development, than perhaps it is premature for either of them to be seeking interconnection.)

The Commission should also be aware that on June 29, 2005, Sprint filed a petition seeking arbitration of its dispute with the ILECs. The petition is identified as Docket No. 05-0402 and has been assigned to Judge Yoder and me. The deadline in Docket No. 05-0402 is October 22, 2005. If the Commission enters the attached PEPO and grants the declaratory relief, these dockets will conclude. Docket No. 05-0402 would also logically end. The first issue to be arbitrated identified by Sprint is whether Sprint is a "telecommunications carrier" within the meaning of the Federal Act. On July 1, 2005, seven of the ILECs that are parties to these consolidated dockets[4] filed a motion in Docket No. 05-0402 requesting that Sprint's petition for arbitration be dismissed. The primary basis for the seven ILECs' motion to dismiss is that Sprint is not a "telecommunications carrier" under the circumstances. This is the same issue before the Commission in the attached PEPO.

If the Commission rejects the PEPO, the alternative suspension requests by the ILECs must be addressed. Because the deadline for the suspension requests is October 12, 2005, I recommend that the Commission deny the declaratory ruling requests (if it intends to do so) no later than the July 13, 2005 Bench Session so that the remaining 91 days can be used. Any interim order denying the declaratory ruling requests should also contain language suspending any obligations under Section 251(b) until the ILECs' suspension requests under Section 251(f)(2) are resolved. A suspension of the Section 251(b) obligations is permitted by Section 251(f)(2) while requests under Section 251(f)(2) are being resolved. Any such interim order should also conclude with the following ordering paragraph:

> IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Interim Order is final as to all matters determined herein; it is not subject to the Administrative Review Law.

This language will enable the ILECs to appeal the conclusions in an interim order prior to the entry of a final order in the dockets, which has the potential for saving significant Commission resources.

JDA

[4] Cambridge Telephone Company, C-R Telephone Company, El Paso Telephone Company, Geneseo Telephone Company, Henry County Telephone Company, Mid Century Telephone Cooperative, Inc., and Reynolds Telephone Company.